STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

JOHN A. DUCKETT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001347

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner was unaware of enhancements in the charges to which he pled, where counsel failed to explain the sentencing range to which he was exposed for each charge?

STATEMENT

In April and July 2016, Petitioner was indicted by a Greenville County grand jury on the following charges: possession of cocaine base, two counts of distribution of heroin, and distribution of cocaine base. App. 240 – 247. He proceeded to trial on two of those charges on October 9, 2017 before the Honorable G. Thomas Cooper, Jr. and a jury. App. 1. Dorothy Manigault represented Petitioner; Howard Steinberg appeared on behalf of the state. At the outset of trial, Petitioner moved to relieve counsel. App. 6 ll. 5 – 14. In support of the motion, Petitioner contended that counsel had not "represented [him] to the best of her ability" and failed to answer questions he asked. App. 8 l. 4 – App. 10 l. 1. The motion was denied. App. 13 l. 16 – App. 14 l. 16.

After a two-day trial, the jury found Petitioner guilty as indicted on both charges, the distribution of cocaine base, third offense, as well as the distribution of heroin, third offense. App. 170 ll. 6 – 10. Following the reading of the verdict, Petitioner indicated that he wished to plead to the remaining charges. App. 173 ll. 5 – 8. The assistant solicitor suggested that Petitioner remain in the county jail for thirty days after the conclusion of trial so that the other pending charges could be addressed. App. 178 ll. 7 – 11. Counsel for Petitioner did not object, and the trial judge requested an order indicating such. App. 178 ll. 7 – 16. Judge Cooper sentenced Petitioner to ten years on each offense, with the sentences crafted to run concurrently. App. 180 ll. 4 – 9. Immediately after the sentence was read, Petitioner requested an appeal. App. 180 ll. 12 – 17.

Two days later, on October 12, 2017, Petitioner appeared before the Honorable Letitia Verdin with the same attorneys present. App. 182. Petitioner pleaded guilty to the remaining charges, possession of cocaine base, third offense, and distribution of heroin, third offense. App.

184 ll. 1 – 8; App. 187 ll. 15 – 19. The plea judge accepted his plea. App. 187 ll. 18 – 25. The facts as alleged by the state were as follows:

Petitioner was in a car that was stopped for a traffic violation on December 20, 2014. App. 186 l. 9 – App. 187 l. 13. When Petitioner was told by law enforcement that there was an active bench warrant in his name, he supposedly put his hands in his pockets and threw a small baggy onto the ground. Id. According to the assistant solicitor, that bag contained a substance which field tested positive for crack cocaine. As to the other offense, the state contended that Petitioner sold a small amount of heroin to an undercover officer. Id.

A plea agreement between the parties was for a ten year sentence concurrent to his existing sentences from earlier in the week. App. 187 ll. 10 – 13. As to each offense, Judge Verdin sentenced Petitioner to ten years' incarceration, in line with the recommendation. App. 188 ll. 2 – 19. Those sentences ran concurrent to his prior ten year sentences.

Petitioner filed an application for post-conviction relief on September 5, 2018. App. 190 – 195. It contained allegations of ineffective assistance of counsel, including a claim that counsel failed to investigate, as well as due process violations. App. 192 – 194. The state filed its Return and Motion for More Definite Statement on or about April 26, 2019. App. 196 – 203.

An evidentiary hearing was held before the Honorable Brian Gibbons on June 3, 2019. App. 204. R. Mills Ariail, Jr. represented Petitioner; Taylor Smith appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. Because his direct appeal on the charges for which he was tried was still pending, only the offenses which were resolved during his plea were discussed.

The PCR judge denied relief at the conclusion of the hearing. App. 229 ll. 18 – 21. An Order of Dismissal was filed on July 29, 2019. App. 231 – 239. The Order of Dismissal

contained a footnote discussing the procedural history of the instant case as well as the direct appeal which originated from his two-day trial. App. 232 n. 1. The PCR Judge found that Petitioner failed to meet his burden in establishing any constitutional ineffectiveness since "he has not shown either deficiency or prejudice in Counsel's performance." App. 238.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where Petitioner was unaware of enhancements in the charges to which he pled, where counsel failed to explain the range of time to which he was exposed for each charge.

Relevant facts

Petitioner was not fully advised of the details surrounding his plea. First, Petitioner believed he was pleading to a single charge begore Judge Verdin, not two. App. 211 ll. 9 – 22. Secondly, he did not understand the charges or comprehend that they were billed as third offenses. App. 212 ll. 3 – 8. His plea, therefore, was not made with the full understanding of the repercussions. App. 212 l. 9 – App. 213 l. 2. Notably, the plea judge never found that his plea was freely, voluntarily, or intelligently made. Further, Petitioner was under the impression that one of the charges was going to be dismissed. App. 213 ll. 17 – 25.

Petitioner did not recall discussing the indictments with counsel; she never explained any of the enhancements to him. App. 214 l. 10 – App. 215 l. 19. The failure to adequately articulate any of those important matters in his case was his main contention at the PCR evidentiary hearing. App. 216 ll. 1 – 22.

Counsel was appointed in his case. App. 211 ll. 20 – 22; App. 220 l. 12 – App. 221 l. 6. The two met approximately fourteen times, according to plea counsel. Id. Plea counsel testified that Petitioner requested she discuss with the assistant solicitor the possibility of Petitioner entering drug court. App. 221 l. 25 – App. 222 l. 6. The state refused to allow him to participate in that program. Id. Plea counsel described the plea offers in the case, including the final offer of five years. App. 222 ll. 7 – 25. The five year offer would have resolved all four of the

charges. App. 228 ll. 12 – 25. After that was turned down, the state proceeded to try the case on the first two charges. App. 223 ll. 1 – 12.

The PCR court also heard testimony from plea counsel regarding the motion to be relieved which occurred at the outset of trial. App. 223 l. 13 – 225 l. 3. After that motion was denied and Petitioner was found guilty at trial, he spoke to the assistant solicitor about his other pending charges. App. 225 ll. 4 – 15. According to plea counsel, Petitioner told her he wanted to plead guilty. App. 225 ll. 16 – 24.

Discussion

Petitioner correctly asserted that plea counsel was ineffective, because she did not advise him of the enhanced nature of the charges. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. "'[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, plea counsel failed to adequately explain the charges and applicable sentencing ranges. Petitioner

was offered a five year plea; he likely believed that the minimum sentence could have been five years or less on these offenses

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner's testimony, the prejudice in his case manifests itself in his plea which was made without full knowledge of the charges against him. Had Petitioner been advised of the enhanced nature of the offenses and the possibility of a ten-year sentence, he may have contemplated going to trial as to avoid a potentially lengthy sentence.

Had Petitioner been aware of the full nature of the charges, he may have decided to go to trial rather than plead guilty. Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This Court has held that, "in addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (1991). A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill at 56-57, 106 S.Ct. at 369, 88 L.Ed.2d at 208-09.

The plea judge never found that Petitioner's plea was voluntarily, freely, or intelligently made. The entire process was rushed; Petitioner was neither prepared nor fully advised by counsel. Although plea counsel indicated she met with Petitioner over a dozen times on his charges, there is no guarantee the two discussed the possibility of a plea on these two charges. Further, based on the quick turnaround following his trial, Petitioner was likely unaware of the ramifications of his plea. As such, he received ineffective assistance of counsel which resulted in an unknowing guilty plea, made without full knowledge of the charges against him.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of March, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Anthony Duckett states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on June 3, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for John Anthony Duckett.

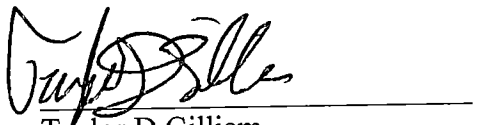
Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of March, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on John Anthony Duckett, #270743, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 11th day of March, 2020.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2020.

Mary Allgire (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.